

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
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COMPLAINT OF SKY ANGEL U.S., LLC)
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Against Discovery Communications, LLC,)
et al. For Violation of the Commission's)
Competitive Access to Cable Programming)
Rules)
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File No. 12-80

FILED/ACCEPTED

APR 16 2010

Federal Communications Commission
Office of the Secretary

**OBJECTIONS AND RESPONSES OF DISCOVERY COMMUNICATIONS, LLC
TO SKY ANGEL'S DISCOVERY REQUESTS**

Pursuant to Section 76.1003(j) of the rules of the Commission,^{1/} Discovery Communications, LLC ("Discovery") responds and objects to the Complainant's First Request for the Production of Documents ("Document Requests") and First Request for Interrogatories ("Interrogatories") served by Sky Angel U.S., LLC ("Sky Angel") on Defendants on March 24, 2010.

This case does not merit the high cost and burden of discovery. As demonstrated in Discovery's "Opposition of Discovery Communications LLC To Emergency Petition for Temporary Standstill," and as Discovery will brief more fully in its Answer to Sky Angel's Complaint, Sky Angel's claims fail as a matter of law. *First*, Sky Angel is not a multichannel

^{1/} 47 C.F.R. § 76.1003(j).

video programming distributor (MVPD).^{2/} Consequently, it is not entitled to relief under the program access rules. *Second*, the applicable statute of limitations presents a time-bar for Sky Angel's claims.^{3/} *Third*, it is neither "unfair" nor "discriminatory" for Discovery to exercise a termination right provided to it by the affiliation agreement, which Sky Angel freely and voluntarily entered into.

Consequently, Sky Angel has not met and cannot meet its threshold legal burden of demonstrating entitlement to relief under the program access rules.^{4/} The Commission should not require the parties to incur the costs, resources and burdens associated with discovery until it has decided these threshold legal issues, which the Commission does not need additional facts to resolve.^{5/}

Moreover, even if the Commission were to permit Sky Angel's Complaint to progress (notwithstanding the legal deficiencies of its claims), the discovery propounded by Sky Angel is still not relevant to this proceeding. This case is fundamentally a contract dispute. Discovery asserted a termination right under its affiliation agreement with Sky Angel. Sky Angel claims that Discovery had no such right. Regardless of who is correct, the Commission does not

^{2/} *Complaint of SKY ANGEL U.S., LLC Against Discovery Communications, LLC et al. for Violation of the Commission's Competitive Access to Cable Programming Rules*, File No. _____, Opposition of Discovery Communications, LLC to Emergency Petition for Temporary Standstill (filed Apr. 12, 2010), at 13-17 ("Opposition to Emergency Standstill") (no FCC file number assigned at time of filing). Discovery hereby incorporates by reference the substance of its Opposition to Emergency Standstill.

^{3/} Opposition to Emergency Standstill at pp. 17-19.

^{4/} See, e.g., 47 CFR § 76.1003(a); *Turner Vision Inc. et al. v. Cable News Network*, 13 FCC Rcd 12610, ¶ 14 (1998) (program access complainant has burden of making prima facie showing).

^{5/} *In Re. Applications of Welch Communications, Inc.; Nunn Corporations; Swan Creek Communications*, 4 FCC Rcd 3979, ¶ 9 (1989) ("It is unremarkable that the law disfavors 'unnecessary' discovery"); *In the Matter of Petition for Rulemaking to Establish Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, ¶ 32, n. 78 (1980) (noting Commission's practice of rejecting unnecessary discovery requests).

ordinarily involve itself in this sort of private contract dispute.^{6/} If Sky Angel has a cognizable claim, it should be brought in a court of law for money damages, and not before the Commission under the guise of a program access issue (which it is not).

I. DISCOVERY ASSERTS THE FOLLOWING GENERAL OBJECTIONS TO SKY ANGEL'S DOCUMENT REQUESTS AND INTERROGATORIES.

A. Discovery objects to the Document Requests and Interrogatories because Sky Angel has not shown that it is an MVPD entitled to seek relief under Section 628. Because Sky Angel has not met (and cannot meet) this burden, its claims fail as a matter of law and discovery is not relevant to this dispute. Minimally, the Commission should resolve this threshold legal question at issue before ordering discovery in this case.

B. Discovery objects to the Document Requests and Interrogatories because the claims in Sky Angel's program access complaint are time-barred by the pertinent statute of limitations. Therefore, the Document Requests and Interrogatories do not seek information that is relevant to this dispute or that would assist the Commission in rendering the purely legal determination, which this case warrants. Minimally, the Commission should resolve this threshold legal question before ordering discovery in this case.

C. Discovery objects to the Document Requests and Interrogatories because Sky Angel has not met its prima facie burden of demonstrating Discovery has engaged in an "unfair practice" or "discrimination" under the program access rules. This dispute is purely contractual. Sky Angel's grievance arises from Discovery's invocation of rights under an affiliation agreement between the parties. If Sky Angel disagrees with Discovery's

^{6/} See, e.g., *EchoStar Communications Corporations v. Speedvision Network, L.L.C. & Outdoor Life Network, L.L.C.*, File No. CSR 5364-P, Memorandum Opinion and Order, 16 FCC Rcd 4949, ¶ 16 (2001) ("The Commission has held in various other instances that it is not the proper forum for the resolution of private contractual disputes.") (citations omitted).

interpretation of the affiliation agreement, Sky Angel's proper claim is for breach of contract in a court of law.

D. Discovery objects to the Document Requests and Interrogatories because they are overly broad, unduly burdensome, and not reasonably tailored to elicit facts – if the Commission finds that it needs additional facts to resolve this case (which it does not) – relevant to the dispute. Indeed, the record of this case will be complete upon completion of the program access complaint pleading cycle. At that time, the Commission will be able to issue judgment in Discovery's favor without the parties – or the Commission – itself having to incur the costs, burdens, and resources associated with discovery.

E. Discovery objects to the Document Requests and Interrogatories to the extent that they define "Discovery" to mean "Discovery Communications, LLC, Animal Planet, LLC, their affiliates, and their employees, agents, attorneys, consultants or representatives acting on behalf of them." This definition is overly broad and unduly burdensome.

F. Discovery objects to the Document Requests and Interrogatories insofar as they define "person" in a way that is contrary to applicable law and FCC precedent.

G. Discovery objects to the Document Requests and Interrogatories because they define "concerning" in a way that is contrary to ordinary usage in the English language.

H. Discovery objects to the Document Requests and Interrogatories to the extent that they define "document" and "communication" in a way that is overly broad, unduly burdensome, or contrary to how those terms are defined by Commission decisions or federal court precedent upon which the Commission relies.

I. Discovery objects to the Document Requests and Interrogatories because they define the term "Other Distributors" in a way that is overly broad, unduly burdensome, or

contrary to how those terms are defined by Commission rules or decisions or federal court precedent upon which the Commission relies.

J. Discovery objects to the Document Requests and Interrogatories to the extent that they seek documents protected from disclosure by the attorney-client privilege, the work-product doctrine, or any other like protection from the disclosure of otherwise relevant and responsive documents recognized by the Commission or by federal law.

K. Discovery objects to the Document Requests and Interrogatories insofar as they seek confidential, proprietary business information without a proper protective order or confidentiality agreement.⁷¹

L. Discovery objects to the Document Requests and Interrogatories insofar as they impose obligations that are more burdensome than those imposed by the Rules of the Commission.

M. Discovery objects to the Document Requests and Interrogatories because they define “or,” “all,” “any,” in a way that is contrary to ordinary usage in the English language.

N. Discovery objects to the Document Requests and Interrogatories because they define the singular to include the plural, the plural to include the singular, and masculine and feminine pronouns to be gender neutral. Those definitions are overly broad, unduly burdensome, and unnecessarily confusing.

⁷¹ On April 13, 2010, the parties submitted an agreed-upon protective order. *Complaint of SKY ANGEL U.S., LLC Against Discovery Communications, LLC, et al., for Violation of the Commission's Competitive Access to Cable Programming Rules*, File No. ____; Joint Motion for Entry of Protective Order (filed Apr. 13, 2010) (“*Protective Order*”) (Protective Order attached to Joint Motion) (no FCC file number assigned at time of filing). Once adopted by the Commission, this objection may no longer be applicable.

O. Discovery objects to the Document Requests and Interrogatories because they do not contain a date range for the information they seek. As such, the discovery propounded by Sky Angel seeks discovery in an overly broad and unduly burdensome way.

II. SPECIFIC OBJECTIONS AND RESPONSES TO SKY ANGEL'S DOCUMENT REQUESTS

In addition to the foregoing general objections, set forth in Section I, above, Discovery specifically responds to the Document Requests as follows:

Request No. 1: All documents concerning the Affiliation Agreement.

Response to Request No. 1:

In addition to the foregoing general objections, Discovery specifically objects to this request because it is vague, overly broad, unduly burdensome, and because it seeks documents that are not relevant to deciding this dispute. Briefly, among other legal deficiencies, Sky Angel is not entitled to relief as a matter of law because it is not an MVPD and because its claims are time barred by the applicable statute of limitations. Consequently, the Commission can resolve this dispute as a matter of law, without imposing on the parties the cost and burdens attendant to discovery.

Setting aside the legal deficiencies of Sky Angel's case, which should be dispositive, this request seeks documents that are not relevant here. The affiliation agreement at issue has a full integration clause, which states that the parties' entire agreement is contained within the four corners of that document.^{8/} Accordingly, the affiliation agreement speaks for itself, and documents "concerning" the affiliation agreement are not relevant to determining the meaning of its terms.

^{8/} *Complaint of SKY ANGEL U.S., LLC Against Discovery Communications, LLC et al. for Violation of the Commission's Competitive Access to Cable Programming Rules*, File No. _____, Program Access Complaint, Attachment B - Affiliation Agreement (filed Mar. 24, 2010) at ¶ 13.5 ("Affiliation Agreement") (no FCC file number assigned at time of filing).

Separately, although the parties have jointly proffered a protective order to the Commission for its adoption in this case, the Commission has yet to do so. Until a protective order is in place in this case, Discovery objects to this request because it seeks competitively sensitive, proprietary information.

Finally, Discovery objects to this document request because it potentially calls for production of documents protected from disclosure by the attorney-client privilege and/or the work product doctrine.

Request No. 2: All documents concerning the letter dated January 22, 2010, and signed by Stephen T. Kaminski of Discovery, informing Sky Angel that Discovery would terminate the Affiliation Agreement.

Response to Request No. 2:

In addition to the foregoing general objections, Discovery specifically objects to this request because it is vague, overly broad, unduly burdensome, and because it seeks documents that are not relevant to deciding this dispute. Briefly, among other legal deficiencies, Sky Angel is not entitled to relief as a matter of law because it is not an MVPD and because its claims are time barred by the applicable statute of limitations. Consequently, the Commission can resolve this dispute as a matter of law, without imposing on the parties the cost and burdens attendant to discovery.

Separately, although the parties have jointly proffered a protective order to the Commission for its adoption in this case, the Commission has yet to do so. Until a protective order is in place in this case, Discovery objects to this request because it seeks competitively sensitive, proprietary information.

Finally, Discovery objects to this document request because it potentially calls for production of documents protected from disclosure by the attorney-client privilege and/or the work product doctrine.

Request No. 3: All documents concerning the letter dated March 19, 2010, and signed by Stephen T. Kaminski of Discovery, which responded to Sky Angel's letter to Discovery dated March 4, 2010.

Response to Request No. 3:

See Response to Request No. 2.

Request No. 4: All documents concerning Discovery's "determination" that "the distribution methodology used by or on behalf of Affiliate [Sky Angel] is not satisfactory."

Response to Request No. 4:

See Response to Request No. 2.

Request No. 5: All documents concerning Discovery's being "uncomfortable" with the Sky Angel distribution system.

Response to Request No. 5:

See Response to Request No. 2.

Request No. 6: All documents concerning every method of distribution of programming, networks, or channels of, related to, or produced by Discovery, which relies, in whole or in part, on the Internet for distribution.

Response to Request No. 6:

See Response to Request No. 2. Additionally, this document request is overly broad because it seeks documents related to "programming" and "channels" "related to, or produced by Discovery," rather than documents related to the specific linear programming networks at issue in this case. To the extent that the Commission permits discovery in this case at all, it should be limited to the programming networks covered by the affiliation agreement at issue in this case.

Subject to and without waiving the foregoing General and Specific objections, Discovery also states in response to this document request that it does not allow any MVPD to distribute any Discovery linear channel over the Internet. Consequently, there are no documents under its control that are relevant to this proceeding.

Request No. 7: All documents concerning every method of distribution of programming, networks, or channels of, related to, or produced by Discovery, which relies, in whole or in part, on Internet Protocol or "IP" technology for distribution.

Response to Request No. 7:

See Response to Request No. 2. In addition, this request seeks documents that are not relevant to this proceeding. Sky Angel's use of IP technology is not a point in dispute in this case. Rather, the central issue here is Sky Angel's use of the public Internet for distribution purposes.

Request No. 8: All documents concerning Other Distributors which rely, in whole or in part, on the Internet for distribution.

Response to Request No. 8:

See Response to Request No. 2. Subject to and without waiving the foregoing General and Specific objections, Discovery also states in response to this request that it does not allow any MVPD to distribute any Discovery linear channel over the Internet. Discovery also does not have records in its possession or control reflecting how other, non-Discovery programming is distributed by distributors.

Request No. 9: All documents concerning Other Distributors which rely, in whole or in part, on Internet Protocol or "IP" technology for distribution.

Response to Request No. 9:

See Response to Request Nos. 2, 8.

Request No. 10: All documents concerning all instances of security breaches of Internet Protocol or "IP" distribution, or of distribution on the Internet, of video programming known to Discovery.

Response to Request No. 10:

See Response to Request Nos. 2, 8. Subject to and without waiving the foregoing General and Specific objections, Discovery also states in response to this request that it does not

have records in its possession or control reflecting how other, non-Discovery programming is distributed by distributors, or records reflecting security breaches of such programming.

Request No. 11: All documents concerning every agreement for distribution of programming, networks, or channels of, related to, or produced by Discovery that Discovery terminated for reasons other than the passage of time.

Response to Request No. 11:

See Response to Request No. 2.

Request No. 12: All documents concerning the terms and conditions by which Discovery authorizes, or has authorized, any distribution of programming, networks, or channels of, related to, or produced by Discovery, in whole or in part, on the Internet or by Internet Protocol, or "IP" technology.

Response to Request No. 12:

See Response to Request Nos. 2, 8. Subject to and without waiving the foregoing General and Specific objections, Discovery also states in response to this document request that it does not allow any MVPD to distribute any Discovery linear channel over the Internet.

III. SPECIFIC OBJECTIONS AND RESPONSES TO SKY ANGEL'S INTERROGATORIES

In addition to the foregoing general objections, set forth in Section I, above, Discovery specifically responds to the Interrogatories as follows:

Interrogatory No. 1. Identify all persons answering these interrogatories, all persons consulted in the preparation of the answers to these interrogatories and all documents consulted, examined or referred to in the preparation of these answers to interrogatories.

Response to Interrogatory No. 1:

In addition to the foregoing General Objections in Section I, above, Discovery objects to this Interrogatory because it is improper under the Commission's rules. Although the Commission permits parties to propound document requests directly,^{9/} only the Commission

^{9/} 47 C.F.R. § 1003(j).

can propound written interrogatories in a program access proceeding.^{10/} Consequently, Discovery currently has no obligation to respond to Sky Angel's propounded Interrogatories.

Also, as drafted, this Interrogatory is overly broad, unduly burdensome, and seeks information that is irrelevant to the resolution of this proceeding.

Interrogatory No. 2. Identify all persons who you believe have knowledge of any facts that in any way concern or relate to the matters at issue in the Complaint and for each person provide a description of the factual areas in which he or she is knowledgeable.

Response to Interrogatory No. 2:

In addition to the foregoing General Objections in Section I, above, Discovery objects to this Interrogatory because it is improper under the Commission's rules. Although the Commission permits parties to propound document requests directly,^{11/} only the Commission can propound written interrogatories in a program access proceeding.^{12/} Consequently, Discovery currently has no obligation to respond to this Interrogatory.

Interrogatory No. 3. Identify all persons who participated in any way, with or on behalf of Discovery, in the formation and execution of the Affiliation Agreement.

Response to Interrogatory No. 3:

See Response to Interrogatory No. 2. Additionally, Discovery objects to this Interrogatory to the extent it seeks information protected from disclosure by the attorney-client privileged and/or the work product doctrine.

Interrogatory No. 4. State the basis of Discovery's decision to enter into the Affiliation Agreement.

Response to Interrogatory No. 4:

See Response to Interrogatory No. 2.

^{10/} *Id.*; 47 C.F.R. § 76.7.

^{11/} 47 C.F.R. § 1003(j).

^{12/} *Id.*; 47 C.F.R. § 76.7.

Interrogatory No. 5. Describe all facts, factors or considerations that caused, or contributed to, and state the basis of, Discovery's decision to terminate the Affiliation Agreement.

Response to Interrogatory No. 5:

See Response to Interrogatory No. 2.

Interrogatory No. 6. Identify all persons who participated in the decision to terminate the Affiliation Agreement.

Response to Interrogatory No. 6:

See Response to Interrogatory No. 2.

Interrogatory No. 7. Identify all persons who participated in any way in causing the January 22, 2010 letter, signed by Stephen T. Kaminski of Discovery and informing Sky Angel that Discovery would terminate the Affiliation Agreement, to be sent to Sky Angel.

Response to Interrogatory No. 7:

See Response to Interrogatory No. 3.

Interrogatory No. 8. Describe all facts and considerations which led to, and state the basis of, Discovery asserting in the January 22, 2010 letter signed by Stephen T. Kaminski of Discovery that "the distribution methodology used by or on behalf of Affiliate [Sky Angel] is not satisfactory."

Response to Interrogatory No. 8:

See Response to Interrogatory No. 2.

Interrogatory No. 9. Identify all persons who participated in any way in causing the March 19, 2010 letter, signed by Stephen T. Kaminski of Discovery and responding to Sky Angel's letter to Discovery dated March 4, 2010, to be sent to Sky Angel.

Response to Interrogatory No. 9:

See Response to Interrogatory No. 3.

Interrogatory No. 10. Describe all facts and considerations which led to, and state the basis of, Discovery asserting in the March 19, 2010 letter signed by Stephen T. Kaminski of Discovery that "the distribution methodology used by or on behalf of Affiliate [Sky Angel] are not satisfactory."

Response to Interrogatory No. 10:

See Response to Interrogatory No. 2.

Interrogatory No. 11. Describe all facts and circumstances that led Discovery to be “uncomfortable” with the Sky Angel programming distribution system, including, without limitation, the facts and circumstances by which Elisa Freeman and Stephan Kaminski stated that Discovery was “uncomfortable” in their conversations with Sky Angel management.

Response to Interrogatory No. 11:

See Response to Interrogatory No. 2.

Interrogatory No. 12. Identify every method of distribution of programming, networks, or channels of, related to, or produced by Discovery which relies, in whole or in part, on the Internet for distribution.

Response to Interrogatory No. 12:

See Response to Interrogatory No. 2.

Interrogatory No. 13. Identify all Other Distributors which rely, in whole or in part, on the Internet for distribution.

Response to Interrogatory No. 13:

See Response to Interrogatory No. 2. However, in further response to this Interrogatory (without waiving its objections), Discovery states that does not keep these records in the ordinary course of its business.

Interrogatory No. 14. Identify every method of distribution of programming, networks, or channels of, related to, or produced by Discovery, which relies, in whole or in part, on Internet Protocol or “IP” technology for distribution.

Response to Interrogatory No. 14:

See Response to Interrogatory No. 2. However, in further response to this Interrogatory (without waiving its objections), Discovery states this interrogatory seeks information concerning use of IP technology, which is not relevant to this proceeding.

Interrogatory No. 15. Identify all Other Distributors which rely, in whole or in part, on Internet Protocol or “IP” technology for distribution.

Response to Interrogatory No. 15:

See Response to Interrogatory No. 2. However, in further response to this Interrogatory (without waiving its objections), Discovery states this interrogatory seeks information concerning use of IP technology, which is not relevant to this proceeding.

Interrogatory No. 16. Identify all instances of security breaches of Internet Protocol or “IP” distribution of video programming known to Discovery.

Response to Interrogatory No. 16:

See Response to Interrogatory No. 2. However, in further response to this Interrogatory (without waiving its objections), Discovery states this interrogatory seeks information concerning use of IP technology, which is not relevant to this proceeding and that this interrogatory seeks information that Discovery does not keep in the ordinary course of its business.

Interrogatory No. 17. Since January 1, 2008, identify every agreement for distribution of programming, networks, or channels of, related to, or produced by Discovery that Discovery terminated for reasons other than the passage of time.

Response to Interrogatory No. 17:

See Response to Interrogatory No. 2.

Interrogatory No. 18. State the basis of every termination decision of Discovery identified in Interrogatory 15.

Response to Interrogatory No. 18:

See Response to Interrogatory No. 2.

Interrogatory No. 19. Described the terms and conditions under which Discovery allows, or has allowed, distribution of programming, networks, or channels of, related to, or produced by Discovery which relies, in whole or in part, on the Internet for distribution.

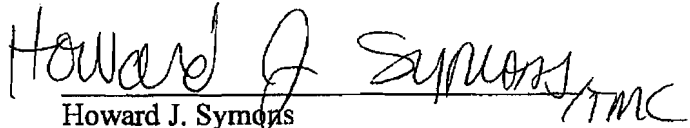
Response to Interrogatory No. 19:

See Response to Interrogatory No. 2. Additionally, this Interrogatory is overly broad because it seeks information concerning “programming” and “channels” “related to, or

produced by Discovery,” rather than information related to the specific linear programming networks at issue in this case. However, in further response to this Interrogatory (without waiving its objections), Discovery states that it has not granted any distributors the right to distribute Discovery’s linear channels over the public Internet.

Dated: April 16, 2010

Respectfully submitted,

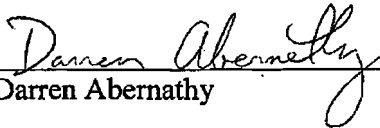
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CERTIFICATE OF SERVICE

I, Darren Abernathy, do hereby certify that on this 16th day of April, 2010, a true and correct copy of the foregoing **OBJECTIONS AND RESPONSES OF DISCOVERY COMMUNICATIONS, LLC TO SKY ANGEL'S DISCOVERY REQUESTS**, was served by first class mail, postage prepaid, on the following:

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